Setting up vibration by piling operations which cause injury to another's property amounts to an actionable nuisance. The principle is no longer open to question on the authorities, and I have so held recently in Kuala Lumpur Civil Suit No. 351 of 1958, *Chan Teck Chye & Another* v. *Yeow Kim Pong Realty Ltd.* As the plaintiffs have a good cause of action in nuisance, it is unnecessary to consider whether the defendants are also liable on other grounds. Such questions can only be of academic interest. I pause only for a moment to mention that the third ground of defence pleaded must be taken to have been abandoned at the trial because there is not a scrap of evidence regarding the works being executed by an independent contractor.

The question that now remains is as to the quantum of damages. Counsel for the defendants cited *Moss* v. *Christchurch Rural District Council* [2] in which Salter J. laid down that the true measure of damages in a case where the building was a total loss is not the cost of reinstatement or rebuilding, but the difference between the money value of the property before and after the damage. No evidence, however, as to the value before and after has been given by either party. There being no material on which any assessment can be made on that basis, any opinion *in vacuo* which I may form cannot provide a substitute in default of evidence. It is, of course, manifest that the plaintiffs are not entitled to have a new house at the defendants' cost in place of the old. On the other hand, it is equally clear that the defendants should not be permitted to dictate in what manner and to what extent restoration or repair should be executed. Nor, I think, should I assess the value of the premises before and after damage as if it were a mere shell of a house, severed from the land, consisting of bricks, mortar and timber. A useful yardstick, in the circumstances, would appear to be the repair costs given by the experts. In round figures such costs have been stated by the plaintiffs' witness to be $16,000 and by the defendants' witness to be $4,000. The latter agreed that execution of the works required by the plaintiffs would cost almost $10,000. These requirements appear to me quite reasonable. The contumelious attitude of the defendants and their architect towards the plaintiffs, in general, and, as an instance, the reckless manner in which the roof of No. 49 Klyne Street was being damaged by building material dropped from a height, in particular, cannot be entirely overlooked. If such material could effectively be prevented from falling on the heads of pedestrians passing along the street below, damage to the plaintiffs' roof could as easily have been avoided. This is a simple but striking illustration of the defendants' concept of the duty they owe to their neighbour. Their architects' own pre-estimate of $4,000, to which he adhered, sprang from that same concept, and I am satisfied that this amount is entirely inadequate. In all the circumstances, I would assess the damages at $10,000. There was no dispute as to the sum of $720 claimed for loss of rent, and I would award that sum in addition. I accordingly give judgment for the plaintiffs for the total sum of $10,720 and costs.

Judgment for the plaintiff.

Solicitors: *Shearn Delamore & Co.; Donaldson & Burkinshaw.*

SIM AH OH v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) November 12, 1961]

[Muar — Criminal Appeal No. 65 of 1961]

Gaming — Assisting in public lottery — Common Gaming Houses Ordinance, 1953, s.4(1)(c).

Evidence — Expert evidence on exhibits — Testing of expert evidence — Date on exhibits inconsistent with date of offence.

Where a prosecution expert deposes on documents to say these are documents for the carrying on of a public lottery, in this case a 10,000 character lottery, the expert must state his reasons for his opinion that the exhibits relate to betting and staking in the character lottery. The evidence of the expert must be tested like any other evidence against the facts upon which he is deposing. *Public Prosecutor* v. *Lee Ee Teong* [1] and *Ang Chwee Keong* v. *R.* [3] followed. *Choo See Kean* v. *Public Prosecutor* [4] explained.

Where the exhibits carry a date antecedent to the date of the offence in the charge, this only means that the element of chance has been decided. If the distribution of the prize money has not taken place, a lottery is still in progress and will continue to remain in progress until the distribution of the money has been completed.

Cases referred to:—

(1) *Public Prosecutor* v. *Lee Ee Teong* [1953] M.L.J. 244.

(2) *Sim Ah Song & Anor.* v. *R.* [1951] M.L.J. 150.

(3) *Ang Chwee Keong* v. *R.* [1955] M.L.J. 36.

(4) *Choo See Kean & Ors.* v. *Public Prosecutor* [1959] M.L.J. 213.

(5) *Kang Yeow Hooi & Ors.* v. *Public Prosecutor* [1954] M.L.J. 233, C.A.

(6) *Chua Chong Chut* v. *Public Prosecutor* [1954] M.L.J. xxxv.

(7) *Public Prosecutor* v. *Neoh Boon Cheow* [1960] M.L.J. 31, C.A.

CRIMINAL APPEAL.

A. J. Braga for the appellant.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the respondent.

Adams J. (delivering oral judgment): The accused was charged before the learned President sitting as Magistrate, Batu Pahat, with assisting in the carrying on of a public lottery, namely 10,000 character lottery, an offence punishable under section 4(1)(c) of the Common Gaming Houses Ordinance No. 26 of 1953. He was convicted and fined $3,000 or 8 months' imprisonment.

The evidence was not seriously disputed. The accused was found coming out of the premises raided with the bundle of documents which were produced in Court on him. The learned Magistrate did not accept his explanation in

view of the Police evidence that he had found them on the road just before his arrest.

Mr. Braga's first point was that there was not sufficient evidence to show that the exhibits in fact referred to a public lottery. He pointed out that the evidence of the expert merely said that he had examined the documents which consisted of records of stakes in the lottery. Mr. Braga referred to *Public Prosecutor* v. *Lee Ee Teong* [1] in which Thomson J. (as he then was) cited from the judgment of Brown Ag. C.J. in *Sim Ah Song & Anor.* v. *R.* [2] in which the learned Ag. C.J. sets out the duties of an expert, and also the case of *Ang Chwee Keong* v. *Regina* [3] on the same matter. Both these cases should be studied with care by Magistrates. He pointed out that the judgment of Hill J. (as he then was) in *Choo See Kean & Ors.* v. *Public Prosecutor* [4] merely did away with the necessity to call expert evidence to prove the *modus operandi* of the lottery but it remained for the expert to give his reasons for his opinion that the exhibits in the case related to betting and staking in the character lottery. Mr. Braga also pointed out that the learned President in his grounds of decision accepted without challenge or enquiry the evidence of the expert.

The learned Deputy Public Prosecutor conceded that the documentary exhibits could relate to anything but relied on the judgment of Hill J. in *Choo See Kean's case* pointing out that the learned President who was sitting as Magistrate is an experienced President and had seen plenty of such documents before and would therefore know that they were records of stakes.

With due respect to the learned Deputy Public Prosecutor I cannot accept this view of the exhibits in this case. They consist of figures jotted down on the backs of envelopes, tear off calendar slips, odd bits of paper and some in a small paper notebook. They could be anything from a list of telephone numbers to a problem in logarithms and the learned President must have relied entirely on the word of the expert in coming to his finding of fact set out in his otherwise admirable judgment. The evidence of the expert must be tested like any other evidence against the facts upon which he is deposing. The expert should have been asked by the prosecutor to elaborate and give his reasons as to why he said these odd pieces of paper were in fact documents relating to public lottery, and the learned President should have considered these reasons before he came to his finding. The appeal must be allowed on that ground.

Mr. Braga's second ground of appeal was that if the documents were in fact record of stakes some of them are apparently dated in April whereas the charge relates to an offence in May. Mr. Braga pointed out that the presumption under section 11 relates to a lottery in progress and that the following decision of the Court of Appeal in *Kang Yeow Hooi & Ors.* v. *Public Prosecutor* [5] that the elements of distribution and chance must both be present for a lottery to be in progress and as the expert also was silent on this point the learned Magistrate should not have called upon the accused for his defence. With respect to Mr. Braga that is not quite what *Kang Yeow Hooi's case* decided. It it true that the elements of lottery and chance must be present but where, as in that case, the element of chance had been decided but distribution of the prize money had not been commenced the Court of Appeal followed the judgment of Thomson J. (as he then was) in *Chua Chong Chut* v. *Public Prosecutor* [6] where it was held that there was nothing repugnant to common sense in saying that a lottery is in progress until it has been complied, that is to say until the distribution or allotment of the money or money's worth had been itself completed. The evidence must be read in the light of the decision of the Court of Appeal in *Public Prosecutor* v. *Neoh Boon Cheong* [7] which decided that the presumption under section 11 dispenses with the proof of the particular contingency upon which the distribution depends. In other words if the prosecution prove as Ong J. said in that case: (a) the possession on the part of the defendant, (b) of memoranda of stakes in relation to a lottery, the presumption arises against him under section 11 of assisting in a lottery then in progress and it is for the defendant to rebut on the probabilities that it is not so.

I do not think that this ground was a good one.

I would add that *Public Prosecutor* v. *Neoh Boon Cheong* being a Court of Appeal case should also be read and understood by all Magistrates.

In this case if the prosecution evidence is correct the accused was caught red-handed in possession of documents which no doubt were as the evidence properly alleged documents relating to a public lottery and in view of the fact that offences of this nature are extremely prevalent, a fact to which Thomson J. (as he then was) referred some years ago as a public scandal, I think in the interests of justice a retrial must be ordered before another Magistrate. The Order will be therefore that the appeal is allowed, a retrial ordered before another Magistrate, bail as before, and any part of the fine to be repaid to defendant.

Appeal allowed.

Retrial ordered.